***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 76-1411

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA :

Plaintiff-Appellee :

-against- :

SEAN C. TOBIN :

Defendant-Appellant :

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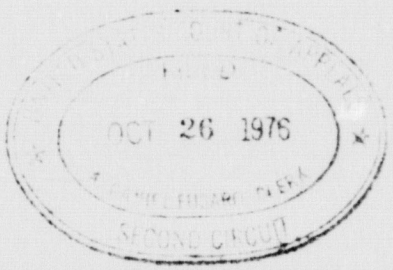
DOCKET NO: 76-1411

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| UNITED STATES OF AMERICA | : | |
| Plaintiff-Appellee | : | |
| -against- | : | DOCKET NO: 76-1411 |
| SUAT C. TORUN | : | |
| Defendant-Appellant | : | |

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT UNDER SECOND CIRCUIT
Rule 28

The decision herein was rendered after a plea of guilty before United States District Court Judge JOHN R. BARTELS in the United States District Court for the Eastern District of New York on October 23, 1975.

STATEMENT OF THE ISSUES

The issues in this case are:

1. WHETHER THE SENTENCING OF THE DEFENDANT-APPELLANT TO AN INDETERMINATE TERM NOT TO EXCEED FOUR YEARS WAS ERRONEOUS ON THE GROUND THAT THE DISTRICT COURT JUDGE'S FINDING OF BENEFIT WAS NOT SUPPORTED BY THE FACTS.

2. WHETHER THE SENTENCING OF THE DEFENDANT PURSUANT TO TITLE 18 UNITED STATES CODE SECTION 5010(b) WAS VIOLATIVE OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, BECAUSE IT EXCEEDED THE MAXIMUM SENTENCE PERMISSIBLE UNDER TITLE 21 UNITED STATES CODE SECTION 844(a).

## STATEMENT OF THE CASE

The defendant-appellant pleaded guilty to an information on October 23, 1975 charging him with violating Title 21 United States Code Section 844(a), in that the defendant-appellant on or about the 20th day of May, 1974, within the Eastern District of New York did knowingly and intentionally possess a quantity of cocaine, a Schedule II controlled substance, which possession was not pursuant to a valid prescription or order from a practitioner acting in the course of his professional practice and which possession was not authorized by any subchapter of the Narcotics Control Act of 1970.

The defendant-appellant was sentenced on December 19, 1975 before United States District Court Judge JOHN R. BARTELS.

On December 19, 1975, United States District Court Judge JOHN R. BARTELS sentenced the defendant-appellant to an indefinite term to the custody of the Attorney General for treatment and supervision pursuant to the provisions of the Youth Correction Act Title 18 United States Code Section 5010(b).

There was an appeal to the United States Court of Appeals for the Second Circuit and the matter was decided June 14, 1976 and remanded for resentencing on the basis that there was no express finding that the defendant-appellant would benefit from FYCA treatment.

On August 27, 1976, the defendant-appellant was resentenced by the Honorable JOHN R. BARTELS, U.S. District Judge E.D.N.Y. and was again sentenced under Title 18 U.S.C. 5010(b). Judge Bartels enumerated those reasons that he deemed pertinent to an express finding that the defendant would benefit by being sentenced under FYCA.

## POINT I

THE SENTENCING OF THE DEFENDANT-APPELLANT TO AN INDETERMINATE TERM NOT TO EXCEED FOUR YEARS WAS ERRONEOUS ON THE GROUND THAT THE DISTRICT COURT JUDGE'S FINDING OF BENEFIT WAS NOT SUPPORTED BY THE FACTS.

Judge Bartels contends that the defendant needs drug abuse counselling and job skill development and that as a result of being sentenced under the Federal Youth Correction Act such counselling and aid will be forthcoming. The fact is that no such aid has been forthcoming during the defendant's incarceration.

In fact the defendant's activities while incarcerated have been working in leathercraft as a hobby, and being an orderly cleaning the hallways. The vocational programs available are welding, barbering and cable shop. During his incarceration at Petersburg Virginia, the defendant comes into contact with older criminals and is in fact not segregated from them and he has not come into contact with anyone like himself that has been convicted of a misdemeanor. It cannot then be said that sentencing Mr. Torum under the FYCA will cure rather than accentuate any anti-social tendencies.

Judge Bartels contends that the conviction of the defendant will be expunged and is therefore a benefit. This is untenable as a benefit because the defendant has been convicted once before and will have a criminal record after expungement in any event.

Judge Bartels' contention that release would depreciate the seriousness of the offense and be incompatible with the welfare of

society has no bearing on whether the defendant will benefit by being sentenced under FYCA.

The fact also that another member of the sentencing panel also recommended a sentence under 18 U.S.C. Section 5010(b) does not relate to the issue of a finding of benefit to the defendant as a result of such a sentence.

In fact the reasons enumerated for sentencing the defendant under the Youth Correction Act do not amount to a finding of benefit.

In light of the foregoing, the defendant-appellant's sentence should be vacated with instructions to resentence pursuant to the provisions of Title 21 United States Code Section 844(a).

## POINT II

THE SENTENCING OF THE DEFENDANT-APPELLANT PURSUANT TO TITLE 18 UNITED STATES CODE WAS VIOLATIVE OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES CONSTITUTION.

The defendant-appellant by pleading guilty to possession of a controlled substance in violation of Title 21 United States Code Section 844(a) faced a maximum penalty of one year imprisonment, a $5,000 fine or both.

Had he been an adult the maximum term of imprisonment would have been one year.

By virtue of the fact that he was sentenced under Title 18 United States Code Section 5010 (b) and received an indeterminate term not to exceed four years, he was in fact being incarcerated for a lengthier time solely because he was a youth and such sentencing was arbitrary and violative of the defendant-appellant's right to due process.

The fact that the legislative purpose of the Youth Correction Act contemplates rehabilitation and not punishment is a matter of semantics and does not detract from the fact the defendant-appellant from a pragmatic standpoint faces a longer term of confinement solely on the basis of his age.

The defendant-appellant while incarcerated at Petersburg Virginia has not been afforded treatment any different or given opportunities for rehabilitation that are different from those

available at any other Federal Correctional Institutions for adults. The defendant-appellant is therefore exposed to the same rehabilitative programs as are adults, the difference being that his exposure is four years of incarceration as opposed to one year.

The guidelines set up by the Parole Board are based on the severity of the offense and the defendant-appellant's Notice of Action indicates a range of twenty-seven to thirty-two months to be served before release.

In United States ex rel Sero v. Preiser 506 F2d 1115 (2nd Cir 1974), the Court of Appeals for the Second Circuit sustained a claim that New York State had denied equal protection to youths convicted of misdemeanors because the treatment they received was identical to that of the adults, however, the youths were incarcerated for a longer period of time.

> "Also, a number of courts have considered the problem raised by application of the guidelines issued by the United States Parole Commission to sentences imposed under the FYCA. E.g., Snyder v. United States Board of Parole, 383 F. Supp. 1153 (D. Colo. 1974); United States v. Norcome, 375 F. Supp. 270, 274 n.3 (D.D.C. 1974). Since these guidelines rely on criteria other than individual rehabilitation in the institution, e.g., offense severity, they undermine a major justification for subjecting any youthful offender to a longer period of incarceration than an adult offender guilty of the same offense. And when the crime involved is a misdemeanor and the possible disparity, as it is here, is three years in prison, the weakening of the rehabilitative justification is most significant. Indeed, the importance of the change in parole policy under the

> guidelines can be seen in this very case. Judge Bartels in sentencing appellant told him that, "It is an elastic sentence and all depends on him." In view of the way the parole guidelines are set up that appears to be no longer true, for the emphasis is more on the nature of the crime and the characteristics of the offender than on conduct in detention." U.S. v. Torun 2nd Circuit decided June 14, 1976.

In light of the foregoing, the defendant-appellant's sentence should be vacated with instructions to resentence pursuant to the provisions of Title 21 United States Code Section 844(a).

## CONCLUSION

THE SENTENCE OF THE DEFENDANT-APPELLANT SHOULD BE VACATED.

Respectfully submitted,

HEADLEY & ZEITLIN
By Trevor L. F. Headley
Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA :

Plaintiff-Appellee :

-against- :

SUAT C. TORUN : AFFIDAVIT

Docket No: 76-1056

Defendant-Appellant :

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STUART SHAROFF, being duly sworn, says:

I am employed in the office of HEADLEY & ZEITLIN, attorney for SUAT C. TORUN. On the 26th day of October, 1976, I personally served a true copy of the annexed BRIEF and APPENDIX on the office of DAVID TRAGER, United States Attorney for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York, leaving a true copy of same with his clerk or other person in charge of said office.

STUART SHAROFF

Sworn to before me this
26 day of October, 1976.

TREVOR L. F. HEADLEY
Notary Public, State of New York
No. 41-4501229
Qualified in Queens County
Term Expires March 30, 1977